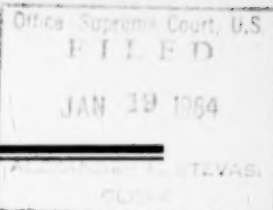


No. 83-196



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
Appellant

v.

MONSANTO COMPANY

---

On Appeal From The United States District Court  
For The Eastern District Of Missouri

---

**BRIEF OF APPELLEE  
MONSANTO COMPANY**

---

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## **THE QUESTION PRESENTED**

Whether the disclosure and private use provisions of the 1978 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136a(c)(1)(D), the last sentence of 136a(c)(2)(A), 136h(b), and 136h(d)(1982)) take private property in the form of trade secrets in violation of the Fifth Amendment to the Constitution.

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<i>Cole v. City of La Grange</i> , 113 U.S. 1 (1885)	45

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<i>House of Tools &amp; Engineering, Inc. v. Price</i> , 504 S.W.2d 157 (Mo. 1973) .....	19
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<i>In re Bettinger Corp.</i> , 197 F. Supp. 273 (D. Mass. 1961), vacated on other grounds sub nom. <i>Walker Mfg. Co. v. Bloomberg</i> , 298 F.2d 688 (1st Cir. 1962) .....	18
<i>In re Keene</i> , 2 Ch. 475 (1865) .....	18
<i>In re the Iowa Freedom of Information Council and Des Moines Register and Tribune Co.</i> , No. 83-1573, slip op. (8th Cir. Dec. 30, 1983) .....	17
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<i>Madisonville Traction Co. v. Saint Bernard Mining Co.</i> , 196 U.S. 239 (1905) .....	45, 47-48
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<i>National Agricultural Chemicals Association v. EPA</i> , 554 F. Supp. 1209 (D.D.C. 1983) .....	9
<i>National Mutual Insurance Co. v. Tidewater Transfer</i> <i>Co.</i> , 337 U.S. 582 (1949) .....	16
<i>National Starch Products, Inc. v. Polymer Industries,</i> <i>Inc.</i> , 79 N.Y.S.2d 357 (App. Div.), <i>appeal denied</i> , 81 N.Y.S.2d 278 (1948) .....	20
<i>Nelson v. Commissioner</i> , 203 F.2d 1 (6th Cir. 1953) ..	18
<i>Northern Pipeline Construction Co. v. Marathon Pipe</i> <i>Line Co.</i> , 458 U.S. 50 (1982) .....	40
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<i>Phillips v. Foster</i> , 215 Va. 543, 211 S.E.2d 93 (1975)	45, 48
<i>Pomeroy Ink Co. v. Pomeroy</i> , 77 N.J. Eq. 293, 78 A. 698 (1910)	17
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<i>Stamicarbon, N.V. v. American Cyanamid Co.</i> , 506 F.2d 532 (2d Cir. 1974)	18
<i>Standard Airlines, Inc. v. CAB</i> , 177 F.2d 18 (D.C. Cir. 1949)	29
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<i>Town &amp; Country House &amp; Homes Service, Inc. v. Evans</i> , 150 Conn. 314, 189 A.2d 390 (1963)	17
<i>Tuttle v. Blow</i> , 176 Mo. 158, 75 S.W. 617 (1903)	17
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<i>Ultra-Life Laboratories v. Eames</i> , 240 Mo. App. 851, 221 S.W.2d 224 (1949)	19
<i>United States v. Bottone</i> , 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966)	18
<i>United States v. Causby</i> , 328 U.S. 256 (1946)	28, 39
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<i>United States v. International Business Machines Corp.</i> , 67 F.R.D. 40 (S.D.N.Y. 1975)	17
<i>United States v. Lester</i> , 282 F.2d 750 (3d Cir. 1960), cert. denied, 364 U.S. 937 (1961)	18

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<i>United States v. Miller</i> , 317 U.S. 369 (1943) .....	40
<i>United States v. New River Collieries Co.</i> , 262 U.S. 341 (1923) .....	40
<i>United States v. Pewee Coal Co.</i> , 341 U.S. 114 (1951) .	32
<i>United States v. Seagraves</i> , 265 F.2d 876 (3d Cir. 1959)	18
<i>United States v. Security Industrial Bank</i> , 103 S.Ct. 407 (1982) .....	14, 16, 47
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<i>Webb's Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980) .....	passim
<i>Wells v. Air Products &amp; Chemicals, Inc.</i> , 383 F. Supp. 146 (N.D. W.Va. 1974) .....	45, 47
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Section 3(c)(1)(D), 7 U.S.C. § 136a(c)(1)(D)(1982). <i>passim</i>	
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26 U.S.C. § 1221 (1982) .....	18
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7 C.F.R. § 1.4(b)(15)(1962) .....	3
7 C.F.R. § 1.4(b)(15)(1967) .....	3
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40 C.F.R. § 2.307(g)(1982) .....	28
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## Legislative Materials

<i>FEPCA Implementation: Hearings Before the House Agriculture Comm.</i> , 93d Cong., 1st Sess. (1973) . . .	5
H.R. Rep. No. 343, 95th Cong., 1st Sess. (1977) . . . .	26, 42
H.R. Rep. No. 663, 95th Cong., 1st Sess. (1977) . . . .	26, 27, 34, 42, 44
H.R. Rep. No. 1560, 95th Cong., 2d Sess. (1978) . .	26, 34, 42
S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. (1972) .	5
S. Rep. No. 334, 95th Cong., 1st Sess. (1977) . . . . .	<i>passim</i>
123 Cong. Rec. 25709 (1977) . . . . .	27, 44
123 Cong. Rec. 25710 (1977) . . . . .	26

## Miscellaneous

Abernathy, <i>Estimated Crop Losses Due to Weeds with Nonchemical Management</i> , in 1 <i>CRC Handbook of Pest Management in Agriculture</i> 159 (1981) . . . . .	2
B. Ackerman, <i>Private Property and the Constitution</i> (1977) . . . . .	48
2 P. Areeda & D. Turner, <i>Antitrust Law</i> ¶ 409a (1978).	35
2 W. Blackstone, <i>Commentaries</i> *405 . . . . .	16
Clarkson, <i>Intangible Capital and Rates of Return</i> (American Enterprise Inst. 1977) . . . . .	17
Connelly, <i>Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data</i> , 1981 <i>Wis. L. Rev.</i> 207 . . . . .	37
Demsetz, <i>Barriers to Entry</i> , 72 <i>Am. Econ. Rev.</i> 47 (1982)	35
EPA Pest. Reg. Notice 83-4 (1983) . . . . .	10
Epstein, <i>Not Deference, But Doctrine: The Eminent Domain Clause</i> , 1982 <i>Sup. Ct. Rev.</i> 351 . . . . .	48
Exec. Order No. 11222, § 205, 30 <i>Fed. Reg.</i> 6469 (1965)	3
45 <i>Fed. Reg.</i> 28105 (1980) . . . . .	7

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47 Fed. Reg. 57635 (1982) .....	9
48 Fed. Reg. 32012 (1983) .....	9
Goring, <i>The Costs of Commercializing Pesticides</i> , Int'l Conf. Entomology, August 20, 1976, reprinted in <i>Hearings on FIFRA Extension Before the Sub- comm. on Agricultural Research and General Legis- lation of the Senate Committee on Agriculture, Nutrition and Forestry</i> , 95th Cong., 1st Sess. 254 (1977) .....	21
Grabowski & Mueller, <i>Industrial Research and Develop- ment, Intangible Capital Stocks and Firm Profit Rates</i> , 9 Bell J. Econ. 328 (1978) .....	17
Hirschey, <i>Intangible Capital Aspects of Advertising and R&amp;D Expenditures</i> , 30 J. Indus. Econ. 375 (1982). .....	17
Interpretation 18, Interpretation with Respect to Warn- ing, Caution and Antidote Statements Required to Appear on Labels of Economic Poisons, 27 Fed. Reg. 2267 (1962) .....	4
IRS Rev. Rul. 64-56, 1964-1 C.B. 133 .....	19
IRS Rev. Rul. 71-564, 1971-2 C.B. 179 .....	19
Journal of International Agriculture, <i>World Crops</i> 156 (Sept./Oct. 1982) .....	2
Katz, <i>Thomas Jefferson and the Right to Property in Revolutionary America</i> , 19 J. Law & Econ. 467 (1976) .....	15-16
L. Levy, <i>The Origins of the Fifth Amendment</i> (1968) .	15
J. Locke, <i>The Second Treatise of Government</i> , ch. 5, in <i>Two Treatises of Government</i> (1968) .....	15
6 J. Madison, <i>Essay on Property in Writings</i> (Hunt ed. 1906) .....	15
F. McEwen & G. Stephenson, <i>The Use and Significance of Pesticides in the Environment</i> (1979) .....	31
Meidinger, <i>The "Public Use" of Eminent Domain</i> , 11 Envtl. L. 1 (1980) .....	48

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Michelman, <i>Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law</i> , 80 Harv. L. Rev. 1165 (1967) .....	32
1 R. Milgrim, <i>Trade Secrets</i> (1983)	
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National Research Council Report to the President, <i>World Food and Nutrition Study</i> (1977) .....	2
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Note, <i>Public Use, Private Use, and Judicial Review in Eminent Domain</i> , 58 N.Y.U. L. Rev. 409 (1983) .	48
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Restatement of Torts § 757 (1939) .....	16, 20, 21
Restatement of Torts § 757, comment b (1939) .....	16
Restatement (Second) of Trusts § 82, comment e (1959).	18
Sax, <i>Takings and the Police Power</i> , 74 Yale L.J. 36 (1964)	14
1 B. Schwartz, <i>The Bill of Rights: A Documentary History</i> (1971) .....	15
1 A. Scott, <i>The Law of Trusts</i> § 82.5 (3d ed. 1967) ....	18
Speech of James Madison, June 8, 1789, 1 Annals of Congress 434 .....	15
G. Stigler, <i>The Organization of Industry</i> (1968) .....	35
L. Tribe, <i>American Constitutional Law</i> § 9-5 (1978) ..	29
United States Department of Justice, <i>Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act</i> (1967) .....	20
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-196  
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WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
Appellant

v.

MONSANTO COMPANY  
—

On Appeal From The United States District Court  
For The Eastern District Of Missouri  
—

**BRIEF OF APPELLEE  
MONSANTO COMPANY**  
—

**STATEMENT**

Trade secrets are an important form of property in the United States. Promoting innovation and scientific advancement, the protection of trade secrets is vital to the existence of many high-technology sectors of the economy. One such sector is the pesticide industry, which confers enormous benefits on American agriculture.

Successful pest controls have been largely responsible for dramatic improvements in yields on the nation's farms during the last 40 years.<sup>1</sup> Despite great technological advances since

<sup>1</sup> S. Rep. No. 334, 95th Cong., 1st Sess. 32 (1977). For example, the elimination of pesticides to control weeds "and the use of economically feasible nonchemical means (rotation, sanitation, biocontrol, etc.) would reduce annual farm revenues 31% resulting in economic losses (based on 1976 figures) of \$13.0 billion," which would cause "severe shortages of food and

[Footnote continued]

World War II, pests continue to destroy one-third of the world's food crop; many pests remain uncontrolled and others have become resistant to existing control methods. As a result, "pest control research necessarily entails a ceaseless search for new practices just to 'stay even.' This includes the search, now primarily in the private sector, for more effective and safer pesticides."<sup>2</sup>

In its quest for better pesticides,<sup>3</sup> Monsanto Company<sup>4</sup> develops valuable property in the form of trade secrets.<sup>5</sup> These trade secrets are contained in Monsanto's research and test data, which the company submits to the Environmental

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fiber in the U.S. and result in a 50% or greater increase in food prices to the American public." Abernathy, *Estimated Crop Losses Due to Weeds with Nonchemical Management*, in 1 *CRC Handbook of Pest Management in Agriculture* 159 (1981).

<sup>2</sup> National Research Council Report to the President, *World Food and Nutrition Study* 81 (1977). See, e.g., *Journal of International Agriculture, World Crops* 156 (Sept./Oct. 1982); G. Ware, *Pesticides: Theory and Application* 5 (1983). The world's main source of food—plants—compete with 30,000 species of weeds, are susceptible to 100,000 diseases and are attacked by 10,000 species of plant-eating insects. *Id.*

<sup>3</sup> The term "pesticides" includes herbicides, insecticides, rodenticides and plant regulators. See 7 U.S.C. § 136(u)(1982).

<sup>4</sup> The Statement of Parties to the Proceedings, pursuant to Supreme Court Rule 28.1, appears at page ii of Monsanto's Motion to Affirm. In the interim, Monsanto has acquired a 50% interest in Control Specialist (Pty.), Ltd. and Nippon Fisher Company, Ltd.

The following abbreviations are used in this brief: "J.A." (Joint Appendix in this Court); "J.S." (EPA's Jurisdictional Statement); "J.S. App." (Appendix to EPA's Jurisdictional Statement reprinting the district court's decision, now reported at 564 F. Supp. 552); "Mot. Aff." (Monsanto's Motion to Affirm); "EPA Brief" (brief on merits for the appellant); "Tr." (trial transcript).

<sup>5</sup> Monsanto conducts extensive research aimed at discovering new chemicals that have the potential to be transformed into commercially successful pesticides. J.A. 131-33. See pages 21-25 *infra*. Although Monsanto has laboratories in Europe, South America and Asia, its pesticide research is primarily conducted at Monsanto's facilities in St. Louis, Missouri. J.A. 116-17; J.S. App. 2a.

Protection Agency (EPA) to support Monsanto's registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

The issues in this case focus on whether the government may deprive Monsanto of this property by publicly disclosing the company's research and test data and by allowing Monsanto's competitors to use the data. After a full trial on the merits, the district court held that the particular 1978 amendments to FIFRA which mandated this result violate the Taking Clause of the Fifth Amendment to the Constitution. This is a direct appeal from the court's final judgment enjoining EPA from implementing these use and disclosure provisions.

#### A. The FIFRA Amendments At Issue.

FIFRA provides that before any pesticide may be sold or distributed in the United States, EPA must register the pesticide and approve its composition and label. J.S. App. 7a. The label must contain, among other information, the name and percentage of each active ingredient; the total percentage of all inert ingredients; the uses for which the pesticide may be sold and directions for these uses; and all necessary warnings, hazard statements and limitations on use. *Id.* at 7a-8a; 7 U.S.C. § 136a(c)(1)(1982); 40 C.F.R. § 162.10 (1983). Before approving an application for registration, EPA must determine that the pesticide "will perform its intended function without unreasonable adverse effects on the environment" and that "its composition is such as to warrant the proposed claims for it." 7 U.S.C. § 136a(c)(5)(1982).

Since FIFRA's enactment in 1947, applicants have supported their pesticide registrations by submitting research and test data that often included valuable trade secrets they had developed. From 1947 until the 1978 FIFRA amendments, the confidentiality of these trade secrets was preserved.<sup>6</sup> Al-

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<sup>6</sup> J.S. App. 26a-27a; J.A. 63-65, 84-85, 96; 7 C.F.R. § 1.3(b)(1)(1949); 7 C.F.R. § 1.4(b)(15)(1962); 7 C.F.R. § 1.4(b)(15)(1967); Exec. Order No. 11222, § 205, 30 Fed. Reg. 6469 (1965).

though not mentioned by EPA, agency disclosure of the trade secrets would have been an offense under the Trade Secrets Act, 18 U.S.C. § 1905 (1982). It was also the policy of the United States Department of Agriculture (USDA), which administered FIFRA before EPA, that research and test data submitted by one company in order to obtain a registration could not be used by another company for registration purposes without the data submitter's consent.<sup>7</sup>

Congress reaffirmed this historic protection of trade secrets in 1972, two years after EPA began administering FIFRA. In response to concerns that EPA was seeking to abandon this protection, the 1972 amendments expressly prohibited EPA from disclosing trade secrets and from granting a registration to one company on the basis of another's trade secrets unless the trade secret owner had first agreed. *See* Federal Environ-

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<sup>7</sup> There is no basis for EPA's claim that one of the district court's findings of fact is clearly erroneous. EPA Brief at 8 n.8, 30. Former Directors of USDA's Pesticide Regulation Division testified that USDA's "policy, from the very beginning" was that data submitted to register a pesticide "belonged to one individual registrant [and] was not to be used by another unless he had permission." J.A. 85; *id.* at 60-62. The Chief Staff Officer for Human Safety in USDA (and the EPA), who supervised the employees engaged in the registration process, confirmed that this was the policy. *Id.* 63-65. There is thus more than substantial evidence to support the district court's finding that USDA's "policy" when it administered FIFRA was that data submitted by one company could not be used to support the registration of another company's pesticide without permission of the data submitter. J.S. App. 26a. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855-58 (1982). The testimony EPA relies upon shows at most that some USDA employees might have violated USDA's policy. "Interpretation 18," which EPA also cites, is merely a USDA regulation setting forth the information to be contained on labels of common pesticides. *See* Interpretation with Respect to Warning, Caution and Antidote Statements Required to Appear on Labels of Economic Poisons, 27 Fed. Reg. 2267 (1962). It neither states nor purports to state USDA's policy on "piggyback" registrations, a policy that the Pesticide Regulation Division Directors established. J.A. 85. The evidence at trial here also showed Monsanto did not know that after EPA began administering FIFRA, one company used Monsanto's data for registration purposes. J.A. 232.

mental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973, 979-80 (1972). Contrary to EPA's suggestion (EPA Brief at 10-11, 31), in protecting trade secrets Congress itself adopted "the definition of 'trade secret' as incorporated in the RESTATEMENT OF TORTS [§ 757]." S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72 (1972). A series of judicial decisions subsequently compelled EPA to accept the Restatement definition, which it had strenuously opposed. *See, e.g., Mobay Chemical Co. v. Costle*, 447 F. Supp. 811, 825 (W.D. Mo. 1978); *Chevron Chemical Co. v. Costle*, 443 F. Supp. 1024, 1031-32 (N.D. Cal. 1978).<sup>8</sup>

When Congress amended FIFRA in 1978, it enacted the disclosure and use provisions found unconstitutional in this case. Amended Sections 10(b) and (d) and the last sentence of amended Section 3(c)(2)(A) drastically altered FIFRA by removing the former prohibitions against EPA's divulging of trade secrets. Instead of preserving the confidentiality of a company's research and test data submitted with its registration application, the amended provisions *direct* EPA to make such data "available for disclosure to the public" within 30 days after registering the pesticide. 7 U.S.C. §§ 136a(c)(2)(A), 136h(d)(1)(1982).<sup>9</sup> The record in this case demonstrates that

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<sup>8</sup> *See also Amchem Products, Inc. v. GAF Corp.*, 594 F.2d 470 (5th Cir. 1979); *Dow Chemical Co. v. Costle*, No. 76-10087 (E.D. Mich. Nov. 16, 1977); *Mobay Chemical Corp. v. Train*, 394 F. Supp. 1342 (W.D. Mo. 1975). EPA initially refused to follow the Restatement definition of trade secrets (Trial Exh. 29), and during oversight hearings, was severely chastised for being "bitterly opposed" to the statutory prohibitions regarding the disclosure and use of trade secrets. *FEPCA Implementation: Hearings Before the House Agriculture Comm.*, 93d Cong., 1st Sess. 11-12 (1973) (Rep. Poage, Chmn.). EPA nevertheless began automatically rejecting *all* claims of trade secret protection until the decisions cited above halted this practice.

Contrary to EPA's suggestion (EPA Brief at 10), the 1975 FIFRA amendments did not address the question whether trade secrets in pre-1970 data could be "used in considering another application." *Mobay Chemical Corp. v. Costle*, 439 U.S. 320 (1979).

<sup>9</sup> Throughout this litigation EPA has been prohibited from disclosing Monsanto's trade secrets or allowing them to be used by competitors. Trial

[Footnote continued]

Monsanto's competitors can and would receive Monsanto's trade secrets through these provisions. J.A. 218, 253-54; Trial Exh. 14. Although amended Section 10 does provide a narrow exemption from disclosure of product formulas and manufacturing processes, and amended Section 10(g) prohibits EPA from "knowingly" disclosing a registrant's data to a foreign or multinational pesticide producer, the record further reveals that these limited measures would not effectively forestall disclosure of virtually all of Monsanto's trade secrets.<sup>10</sup>

The 1978 amendments also removed the requirement that an applicant obtain the permission of a trade secret owner in order to use the trade secret to support registration. If the applicant's pesticide contains ingredients similar to those in products registered by other producers, the applicant may rely on the trade secrets submitted by its competitors without conducting any research of its own and procure what is commonly

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Exhs. 47 and 50. See Justice Blackmun's opinion denying EPA's stay application. Mot. Aff., App. A. Nevertheless, Monsanto has continued to be threatened with the disclosure and use of its trade secrets, especially by several EPA lapses which have resulted in disclosures. For example, EPA revealed certain Monsanto test data to a private attorney on May 7, 1982, and to *Pesticide and Toxic Chemical News* for a story appearing June 15, 1983. After the first incident, the district court ordered EPA to show cause why its Administrator should not be held in contempt; on August 31, 1982, EPA consented to an order further restricting its treatment of Monsanto's trade secrets.

<sup>10</sup> EPA's own expert testified at trial that the exemption for product formulas and manufacturing processes would apply to only a minute fraction of the trade secrets Monsanto has submitted. See J.A. 256-58. Even for that fraction, Sections 10(b) and 10(d)(1) permit disclosure based on generalized findings by the Administrator. 7 U.S.C. §§ 136h(b), 136h(d)(1)(1982). The Section 10(g) limitation, when it applies, simply requires recipients to "affirm" that they do not presently intend to deliver or sell the disclosed information to a foreign or multinational producer. 7 U.S.C. § 136h(g)(1)(1982). Apart from loopholes EPA has acknowledged, see page 33 & note 45 *infra*, no provisions exist for monitoring and enforcing the affirmation. Despite the affirmation, foreign companies already have sought Monsanto's trade secrets under Section 10. See Tr. 632-34; J.A. 75-76 (reprinting form affirmation).

known as a "me-too" or "piggyback" registration for its competing product. 7 U.S.C. § 136a(c)(1)(D)(1982).

Recognizing that the use provision would deprive companies of valuable property in the form of trade secrets, Congress created a limited private compensation scheme for trade secrets submitted after 1969. 7 U.S.C. § 136a(c)(1)(D)(ii)(1982); S. Rep. No. 334, 95th Cong., 1st Sess. 31 (1977). Those competitors who use another's research and test data to register domestic pesticides must, in certain instances, offer compensation to the property owner. S. Rep. No. 334 at 31; 7 U.S.C. § 136a(c)(1)(D)(1982). If the offer is unacceptable, the owner must submit to binding arbitration. If he does not, the "piggyback" applicant obtains the registration and the owner forfeits the right to any compensation. 7 U.S.C. § 136a(c)(1)(D)(ii)(1982). The amendments provide no standards for determining the amount of compensation (45 Fed. Reg. 55394 (1980)(FMCS notice); J.S. App. 21a, 34a) and EPA informed Congress that EPA had no expertise to set such standards. S. Rep. No. 334, at 72.<sup>11</sup>

Although companies that acknowledge reliance upon data disclosed under Section 10 to register their pesticides must offer compensation, there is no such requirement for competitors who use the data to generate their own registration mate-

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<sup>11</sup> The private arbitrators appointed pursuant to Section 3(c)(1)(D) have essentially unreviewable power. The Federal Mediation and Conciliation Service (FMCS) has decided not to promulgate substantive standards for arbitrating FIFRA disputes and FMCS's view is that Section 3(c)(1)(D) and its legislative history "illustrate the difficulty of establishing a comprehensive set of substantive standards." 45 Fed. Reg. 28105, 28107 (April 28, 1980). FMCS "rarely arranges or conducts arbitration of commercial disputes." 45 Fed. Reg. at 28106; *id.* at 55395 (Aug. 19, 1980). The "private labor arbitrators [on its roster] do not handle commercial disputes such as the compensation disputes arising under FIFRA." *Id.* at 28106. Consequently, arbitrations under Section 3(c)(1)(D) are conducted under the auspices of the American Arbitration Association (AAA), and FMCS makes its appointments from AAA's panel of commercial arbitrators. 29 C.F.R. § 1440.1 (1982); 45 Fed. Reg. at 28106.

rial or who use the data outside the FIFRA registration process. Such competitors are free to do with the data as they please and to obtain whatever advantage they can without compensating the trade secret owner for his property.<sup>12</sup> None of the 1978 FIFRA amendments provides that the federal government must compensate the trade secret owner for the loss of his property.

#### B. The Effect Of The District Court's Injunction.

Although the constitutional issues presented here arise in the context of an environmental regulatory statute, this is not a health and safety case. Instead, it is a case of first impression involving the protection of trade secrets under the Fifth Amendment. The district court's limited injunction protecting Monsanto's trade secret property does not impair EPA's ability to make health and safety determinations. *See* J.S. App. 42a-43a. Monsanto has never challenged the provisions in FIFRA requiring applicants to submit adequate information to justify registration.

The disclosure provisions, which the district court enjoined, are at best ancillary to EPA's scientific review process. It is, of course, EPA's responsibility to review and evaluate the data supporting registration applications, and EPA has not contended that it requires assistance from the public to fulfill this responsibility. *See, e.g.*, EPA Brief at 24-26. In any event, EPA does not get such assistance from the 1978 amendments since the disclosure provisions do not make information available until *after* EPA grants a registration. 7 U.S.C. § 136a(c)(2)(A)(1982). To the extent EPA needs expert outside advice, EPA can and does seek it on a confidential basis from scientific consultants pursuant to Section 21 of FIFRA. In addition, the agency regularly obtains expert technical review

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<sup>12</sup> In addition, no compensation is required for use of data submitted before 1970, for any data fifteen years after submission, or for competitors' private use of the data for purposes other than domestic "piggyback" pesticide registrations. 7 U.S.C. § 136a(c)(1)(D)(iii)(1982).

from the FIFRA Scientific Advisory Panel and its appointees under FIFRA § 25(d). 7 U.S.C. §§ 136s, 136w(d)(1982). See J.S. App. 24a-25a.

The data use provision does not advance safety and in fact reduces the scientific foundation available for EPA to evaluate the safety of "piggyback" pesticides. Applicants, not EPA, decide whether to undertake their own research and testing or to rely on their competitor's data.<sup>13</sup> Thus, FIFRA's use provision merely facilitates a competitor's interest in obtaining registration; the provision does not contribute to the agency's safety evaluation. Without this provision, competing companies would test and research their potential products. Such research and testing would independently establish the safety and efficacy of subsequent pesticides and serve as a check on the validity of research and test data submitted on similar pesticides registered previously. The 1978 amendments eliminated this check by allowing a competitor's products to be marketed solely on the basis of the first registrant's research and testing.<sup>14</sup>

In short, despite the district court's injunction and Circuit Justice Blackmun's denial of EPA's request for a stay,<sup>15</sup> EPA remains free to grant, deny, cancel and suspend pesticide registrations. See also 48 Fed. Reg. 32012 (1983) (announcing

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<sup>13</sup> See *National Agricultural Chemicals Association v. EPA*, 554 F. Supp. 1209 (D.D.C. 1983) (invalidating 40 C.F.R. § 162.9-4, 5 (1979) and 47 Fed. Reg. 57635 (1982)) (not appealed by EPA).

<sup>14</sup> Some *amici* supporting EPA argue that disclosure is necessary so that interested third parties can replicate the research and test data to confirm its validity. Other *amici* (and EPA) argue that the use provision is necessary to avoid such replication because it is wasteful and duplicative. *Contrast* Brief of the American Ass'n for the Advancement of Science *et al.*, as *Amicus Curiae* and Brief of the Pesticide Producers Ass'n *et al.*, as *Amici Curiae*. See also Appendix B to Monsanto's Brief in Opposition to EPA's Application for a Stay Pending Appeal (July 11, 1983).

<sup>15</sup> Circuit Justice Blackmun denied EPA's application on July 27, 1983, with a written opinion included as Appendix A to the Motion to Affirm.

EPA Pest. Reg. Notice 83-4, at 1) ("the Agency will remain free to evaluate all relevant data in its files").

### SUMMARY OF ARGUMENT

I. Monsanto's trade secrets constitute private property within the meaning of the Taking Clause. EPA conceded as much when it stipulated that Monsanto's trade secrets were property. The district court held only that because the FIFRA use and disclosure provisions take Monsanto's property in violation of the Taking Clause, the provisions could not be considered a valid regulation of interstate commerce. EPA proposes that in deciding whether the FIFRA amendments take private property for a public use in violation of the Fifth Amendment, the Court should employ a traditional Commerce Clause analysis by balancing the private interest destroyed against the public interest advanced by the legislation. EPA's balancing test, however, conflicts with the Fifth Amendment, which permits takings only for a "public use" but nevertheless requires "just compensation" regardless of how strong (or weak) the policies underlying the legislation happen to be.

The Framers of the Fifth Amendment defined property to include not only physical things, but other products of man's labor and invention. Gaining meaning from experience, the term "property" in the Fifth Amendment includes intangible property. Today the recognition of trade secrets as property is critically important to American industry and to the continued technological growth that is transforming the American economy.

Trade secrets are therefore recognized as property under state and federal law, including the Internal Revenue Code. The law of Missouri, where Monsanto is based, and the law of the other states, is that trade secrets are like other forms of property which an owner can sell, license, assign or devise. EPA's claim that trade secrets are not property is contrary to existing rules and understandings, including the understanding of the Department of Justice. As the Court has held, it is

such rules and understandings that determine the meaning of property under the Fifth Amendment.

Monsanto's trade secrets are valuable property and have resulted from an enormous expenditure of time, money and effort. Throughout the pesticide industry, an average of 20,000 chemical compounds must be synthesized and screened before one is found that has the potential for becoming a commercially viable pesticide. The research, testing, and development of potential new pesticides is fraught with many risks. Monsanto's research and test data contain trade secrets that the company uses to discover new pesticides at the rate of 1 in every 10,000 compounds synthesized and screened, which is well above the industry average. Because these trade secrets are extraordinarily valuable, Monsanto keeps the data containing them under lock and key. If Monsanto's trade secrets were not protected, competitors could use them to destroy Monsanto's hard-earned innovative advantages.

EPA's argument that Monsanto's trade secrets are not "property" because Congress legislated them out of existence is contrary to the legislative history of FIFRA. The 1978 FIFRA amendments instead reflect Congress' view that companies such as Monsanto have a continuing proprietary interest in their trade secret data after it has been submitted to EPA. Even if Congress had intended to do so, it cannot preempt the Fifth Amendment and has no power to define "property" for purposes of the Taking Clause. Otherwise, such takings could always be considered a mere redefinition of property. So long as the Fifth Amendment stands, Congress cannot thus make the relinquishment of property a condition of engaging in interstate commerce. EPA's further argument that FIFRA defines the duties of a federal agency is irrelevant to whether Monsanto's trade secrets constitute property. Monsanto's reasonable expectations are derived not from FIFRA, as EPA asserts, but from state law and the rules and understandings that define property under the Fifth Amendment.

II. The FIFRA use and disclosure provisions take Monsanto's trade secret property. For trade secret owners, the

essence of their property is their right to exclude, which encompasses their right to use their property in secret and to prevent others from obtaining their trade secrets except through independent development. The practical effect of the FIFRA amendments, however, is to open Monsanto's research files to the world and to deliver the benefits of its hard-earned trade secrets to its competitors. To disclose trade secrets as FIFRA demands is to destroy this property. Congress itself recognized that it was taking property, which is why it required private compensation in arbitration proceedings whenever a competitor benefited by using another company's data to register a competing pesticide. Moreover, the FIFRA amendments destroy property by transferring it to the public and thereby requiring Monsanto to share it with others. The Fifth Amendment stands as a barrier against such a transformation of private property. While EPA once again invites the Court to employ a balancing test for determining whether a taking has occurred, the Taking Clause rejects the notion that whether property has been taken depends upon the strength of the policies behind the legislation. EPA's further claim that Monsanto "retains rights" to its trade secret property despite FIFRA is inaccurate. When trade secrets are disclosed, they become worthless as property. Only a fool would pay Monsanto for something EPA gives away under FIFRA.

III. "Just compensation" is not provided for the taking of Monsanto's trade secret property. Congress intended the FIFRA private arbitration scheme to be the sole means of compensating owners for their property but that scheme does not provide just compensation, as EPA recognizes. Unlike the statute in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), a Tucker Act remedy would be inconsistent with FIFRA and its legislative history. The question is therefore not whether Congress intended to withdraw a remedy otherwise consistent with the legislation. Moreover, pursuant to the Congressional Budget Act of 1974, Congress determined the FIFRA amendments would not result in additional costs from Claims Court judgments for takings. Congress did not make such a determination in passing the Regional Rail Act of 1973.

IV. The FIFRA use provision takes property for a private use, which the Fifth Amendment prohibits regardless of whether just compensation is provided. As the Court has recognized, transfers of property from one competitor to another must be carefully scrutinized. The fact that such transfers are intended to benefit private competition only begins the inquiry. Congress may promote competition in many ways, but transferring one party's property to another in order to create a new competitor is not one of them.

### ARGUMENT

EPA opens with an elaborate argument that the FIFRA amendments at issue here were within Congress' power under the Commerce Clause. EPA Brief at 19-26. Monsanto follows a different course. The district court held only that legislation violating the Taking Clause of the Fifth Amendment is an invalid regulation of interstate commerce (*see* J.S. App. 33a), not that Congress had otherwise exceeded its Commerce Clause authority. The following discussion therefore begins with the Fifth Amendment.

## I. MONSANTO'S TRADE SECRETS ARE "PRIVATE PROPERTY" WITHIN THE MEANING OF THE TAKING CLAUSE.

### A. Introduction.

With respect to the Fifth Amendment, EPA's contentions differ little from its arguments regarding the Commerce Clause. According to EPA, the 1978 FIFRA use and disclosure provisions do not violate the Taking Clause because Congress struck a proper balance between private rights and the public welfare. EPA thus boldly proclaims that Monsanto's interests in its trade secrets are "insubstantial" compared to "the public interest served by the legislation" and that even the "total destruction" of Monsanto's trade secrets "should count for little when reckoned against the public interest served by the legislation." EPA Brief at 34-35.

This theme, which EPA repeats throughout its presentation, *see, e.g., id.* at 18, 38-40, reflects a line of argument that "has been universally rejected"<sup>16</sup>—namely, that the proper method of analysis under the Taking Clause is to balance the private interest destroyed against the public interest promoted by the governmental action. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979). As this Court has recognized, the position advocated by EPA would emasculate the Taking Clause for the quite apparent reason that legitimate governmental purposes are almost invariably deemed of more public importance than the superseded private use. *See, e.g., United States v. Security Industrial Bank*, 103 S. Ct. 407, 410 (1982); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935).

The Taking Clause assumes the point that EPA belabors: the government can take property only for a "public use." Whether the government has confiscated property depends not at all on the strength—or weakness—of the public policy underlying the legislation authorizing this result. The Taking Clause focuses instead on whether the owner has been deprived of his property. Throughout its brief EPA, in the words of Justice Holmes, seems to have "forg[otten] that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

#### **B. The Term "Property" In The Taking Clause Includes Trade Secrets.**

EPA conceded early in this lawsuit that the research and test data Monsanto has submitted when registering its pesticides under FIFRA "contains or relates to trade secrets as defined by the Restatement of Torts" and that "*Monsanto has*

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<sup>16</sup> Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62 (1964). *See also* page 32 & note 44 *infra*.

certain property rights in its information, research and test data . . . which may be protected by the Fifth Amendment." J.A. 36, 58 (emphasis added). This stipulation binds EPA despite its argument in this Court that Monsanto has no such property rights and that the Fifth Amendment is therefore simply inapplicable. Moreover, the history and purposes of the Taking Clause demonstrate not only that Monsanto's trade secrets are indeed "private property," but also that Congress did not and was not free to legislate Monsanto's property out of existence, as EPA claims the FIFRA amendments have done in this case.

When the Framers provided in the Fifth Amendment that "private property" shall not "be taken for public use without just compensation," they secured for the citizens of this nation one of the most fundamental civil rights. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). To Madison,<sup>17</sup> as to the other Framers, "property" was a "broad and majestic" term. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); see *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (citing *Roth*). Shortly after the Fifth Amendment had been adopted, Madison wrote that property shall not be taken "even for public use without indemnification of the owner" and that in "its larger and juster meaning" the term property "embraces everything to which a man may attach a value and have a right." 6J. Madison, *Essay on Property in Writings* 101, 103 (Hunt ed. 1906). Madison and his contemporaries firmly endorsed the influential views of John Locke that the "products" of a man's labor were his "property." J. Locke, *The Second Treatise of Government*, ch. 5, in *Two Treatises of Government* (1968). Encompassing more than just land or

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<sup>17</sup> As originally introduced by Madison, the author of the Bill of Rights (see 1 B. Schwartz, *The Bill of Rights: A Documentary History* 3 (1971); L. Levy, *The Origins of the Fifth Amendment* 421-22 (1968)), the Clause read: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." Speech of James Madison, June 8, 1789, 1 Annals of Congress 434.

goods, property thus included whatever could be produced through "labour and invention."<sup>18</sup>

Trade secrets fit comfortably within the understanding of the Framers and of this Court. "Private property," of course, now includes both tangible and intangible property. *See, e.g., United States v. Security Industrial Bank*, 103 S. Ct. 407 (1982); *Armstrong v. United States*, 364 U.S. 40 (1960); *United States v. General Motors Corp.*, 333 U.S. 373 (1945). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact' "). Whether defined as a secret formula, pattern or device used in one's business (Restatement of Torts § 757, comment b (1939)) or as Judge Friendly held, "in the broad sense of any unpatented idea which may be used for industrial or commercial purposes,"<sup>19</sup> Monsanto's trade secrets in its research and test data are plainly the product of labor, ingenuity and the expenditure of money and must be considered property.

But Monsanto does not rest on history alone, for the term "property" in the Fifth Amendment must "gather meaning from experience." *Board of Regents v. Roth*, 408 U.S. at 571 (quoting *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting)). The dramatic technological changes that have occurred since World War II, and the consequent transformation of the American economy, have rendered property such as trade secrets far more valuable and important to the continued viability of enterprises than could have been supposed two

<sup>18</sup> 2 W. Blackstone, *Commentaries* \*405 (citing John Locke). Jefferson also adopted the Lockean view that a man's "property was whatever he produced by dint of his personal labor." Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. Law & Econ. 467, 474 (1976).

<sup>19</sup> *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216, 222 n.2 (2d Cir. 1971), cited and relied upon in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974). The Court in *Kewanee* also cited the "widely relied-upon" Restatement definition. 416 U.S. at 474-75.

centuries ago. Today the largest investment of many companies is in the creation and maintenance of such data and it is scarcely surprising that "the stock of intangible capital" derived from research and development "by *Fortune* 500 firms is estimated at \$47.8 billion."<sup>20</sup>

The states and the judiciary, as well as the federal government, have therefore recognized that trade secrets constitute valuable property and are to be treated as such. Both state and federal courts view trade secrets as property.<sup>21</sup> A trade secret, like other forms of property, is assignable.<sup>22</sup> When it is sold, the owner has "transferred property in the secret process." *Fowle*

<sup>20</sup> Hirschey, *Intangible Capital Aspects of Advertising and R&D Expenditures*, 30 J. Indus. Econ. 375, 387 (1982); see, e.g., Clarkson, *Intangible Capital and Rates of Return* (American Enterprise Inst. 1977); Grabowski & Mueller, *Industrial Research and Development, Intangible Capital Stocks and Firm Profit Rates*, 9 Bell J. Econ. 328 (1978).

<sup>21</sup> See, e.g., *In re the Iowa Freedom of Information Council and Des Moines Register and Tribune Co.*, No. 83-1573, slip op. at 1, 5-6, 11 (8th Cir. Dec. 30, 1983); *Allan-Qualley Co. v. Shellmar Products Co.*, 31 F.2d 293, 296 (N.D. Ill. 1927), *aff'd*, 36 F.2d 623 (7th Cir. 1929); *Anaconda Co. v. Metric Tool & Die*, 485 F. Supp. 410, 425-26 (E.D. Pa. 1980); *United States v. International Business Machs. Corp.*, 67 F.R.D. 40, 45 (S.D.N.Y. 1975); *Stalker Corp. v. United States*, 209 F. Supp. 30, 33 (E.D. Mich., 1962); *Kelite Corp. v. Khem Chems. Inc.*, 162 F. Supp. 332, 337 (N.D. Ill. 1958); *Continental Car-Na-Var Corp. v. Moseley*, 148 P.2d 9, 12 (Cal. 1944); *Town & Country House & Homes Serv., Inc. v. Evans*, 189 A.2d 390, 393-94 (Conn. 1963); *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 188 U.S.P.Q. 276, 280 (Del. 1975); *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235, 240 (Ind. 1955); *Homer v. Crown Cork & Seal Co.*, 141 A. 425, 431 (Md. 1928); *Wireless Specialty Apparatus Co. v. Mica Condenser Co.*, 131 N.E. 307, 310 (Mass. 1921); *Glucol Mfg. Co. v. Schulist*, 214 N.W. 152, 153 (Mich. 1927); *Pomeroy Ink Co. v. Pomeroy*, 78 A. 698, 699 (N.J. 1910); *Drake v. Herrman*, 185 N.E. 685, 686 (N.Y. 1933); *Wezler v. Greenberg*, 160 A.2d 430, 437 (Pa. 1960); *McClary v. Hubbard*, 122 A. 469, 473 (Vt. 1923). See generally 1 R. Milgrim, *Trade Secrets* § 1.01[2] at p. 1-7 & n.15 (1983) (collecting cases).

<sup>22</sup> E.g., *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 401-02 (1911); *Painton & Co. v. Bourns, Inc.*, 442 F.2d at 225; *Grand Rapids Wood Finishing Co. v. Hatt*, 115 N.W. 714 (Mich. 1908); *Larx Co. v. Nicol*, 28 N.W.2d 705 (Minn. 1947); *Tuttle v. Blow*, 75 S.W. 617 (Mo. 1903); see 1 R. Milgrim, *Trade Secrets* § 1.02 (1983) (collecting other examples).

v. *Park*, 131 U.S. 88, 98 (1889). Like other types of property, a trade secret can form the *res* of a trust<sup>23</sup> and passes to a trustee in bankruptcy.<sup>24</sup> Federal criminal liability may be imposed for the theft of trade secrets,<sup>25</sup> and many states have enacted statutes specifically directed to this property offense.<sup>26</sup> EPA's position, moreover, would come as quite a surprise to the Internal Revenue Service, for trade secrets have long been regarded as property under the Internal Revenue Code.<sup>27</sup>

<sup>23</sup> Restatement (Second) of Trusts § 82, comment e (1959); 1 A. Scott, *The Law of Trusts* § 82.5 at 703 (3d ed. 1967); see *Green v. Folgham*, 1 Sim. & St. 398, 57 Eng. Rep. 159 (1823).

<sup>24</sup> See *In re Uniservices, Inc.*, 517 F.2d 492, 496-97 (7th Cir. 1975); *In re Bettinger Corp.*, 197 F. Supp. 273 (D. Mass. 1961), vacated on other grounds sub nom. *Walker Mfg. Co. v. Bloomberg*, 298 F.2d 688 (1st Cir. 1962); *In re Keene*, 2 Ch. 475 (1865); 1 A. Scott, *The Law of Trusts* § 82.5 at 407 (3d ed. 1967).

<sup>25</sup> The National Stolen Property Act, 18 U.S.C. § 2314 (1982), in particular, treats trade secrets as property and has been applied to punish their theft. See, e.g., *United States v. Seagraves*, 265 F.2d 876 (3d Cir. 1959) (theft of geographical maps); *United States v. Lester*, 282 F.2d 750 (3d Cir. 1960) (same), cert. denied, 364 U.S. 937 (1961); *United States v. Greenwald*, 479 F.2d 320 (6th Cir.) (documents containing secret chemical formulations), cert. denied, 414 U.S. 854 (1973); *United States v. Bottone*, 365 F.2d 389 (2d Cir.) (Friendly, J.) (documents describing a secret manufacturing process), cert. denied, 385 U.S. 974 (1966). Cf. *Perrin v. United States*, 444 U.S. 37 (1979) (geological trade secrets). See also 18 U.S.C. § 1906 (1982) (prohibiting federal employees from disclosing trade secrets).

<sup>26</sup> More than twenty states have enacted laws making appropriation or unauthorized disclosure of trade secrets a crime. See *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 540 n.11 (2d Cir. 1974) (listing statutes); 1 R. Milgrim, *Trade Secrets* § 1.10 (1983) (same).

<sup>27</sup> "The right of property in industrial knowledge has long been recognized by [the Tax] Court," *United States Mineral Prods. Co. v. Commissioner*, 52 T.C. 177, 196-97 (1969). Under the Internal Revenue Code, "[i]t is well settled that secret processes may constitute property and be dealt with contractually as such." *Nelson v. Commissioner*, 203 F.2d 1, 6 (6th Cir. 1953); *Commercial Solvents Corp. v. Commissioner*, 42 T.C. 455, 467 (1964). The Code defines "capital asset" as "property held by the taxpayer." 26 U.S.C. § 1221. Since trade secrets are property, payments received upon the sale of trade secrets are treated as capital gains. See, e.g., *Ofria v. Commis-*  
[Footnote continued]

In *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 486 (1974), the Court recognized that without legal protection of trade secrets, "organized scientific and technological research could become fragmented, and society as a whole, would suffer." Thus, trade secret law promotes "the efficient operation of industry" and plays an important part "in the technological and scientific advancement of the Nation." *Id.* at 493. In language echoing the Framers' view of property, the Court in *Kewanee* pointed out that the protection of trade secrets "permits the individual inventor to reap the rewards of his labor." *Id.*

The law of Missouri, where Monsanto is based, is consistent with the nationwide understanding that trade secrets are property.<sup>28</sup> Protecting both Monsanto's "rights to exclude others" from its trade secrets and the company's "right to prohibit disclosure of its data" (J.S. App. 31a), Missouri law reflects "existing rules or understandings . . . that secure certain benefits and that support claims of entitlement"—in short, the rules and understandings that determine property interests under the Fifth Amendment, as this Court held in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and *Webb's*

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sioner, 77 T.C. 524 (1981)(sale of trade secrets to Air Force); *Stalker Corp. v. United States*, 209 F. Supp. 30 (E.D. Mich. 1962)(government conceded that trade secrets are property); *Huckins v. United States*, 1960-1 U.S. Tax Cas. (CCH) ¶ 9394 (S.D. Fla. 1960). Moreover, the Internal Revenue Service has ruled that trade secrets constitute property for purposes of a tax-free transfer to a corporation under Section 351 of the Code. See Rev. Rul. 64-56, 1964-1 C.B. 133, as amplified by Rev. Rul. 71-564, 1971-2 C.B. 179 (concluding that the term "property" for purposes of Section 351 includes anything qualifying as a secret process or formula without regard to whether it is patentable).

<sup>28</sup> See, e.g., *Ultra-Life Laboratories v. Eames*, 221 S.W.2d 224, 233 (Mo. 1949); *Godefroy Mfg. Co. v. Lady Lennox Co.*, 134 S.W.2d 140, 141 (Mo. 1939); *Germo Mfg. Co. v. Combs*, 240 S.W. 872, 881 (Mo. 1922). See also *Bunting v. McDonnell Aircraft Corp.*, 185 U.S.P.Q. 698, 703 (Mo. 1975); *House of Tools & Engineering, Inc. v. Price*, 504 S.W.2d 157, 159 (Mo. 1973).

*Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).<sup>29</sup>

EPA would have the Court upset these property interests and, as the 21st century approaches, announce for the first time that one of the most important products of this technological age is not "property" protected by the Fifth Amendment. Years ago the Department of Justice told Congress that "formulae, designs, drawings, research data, etc., which although set forth on pieces of paper, are significant not as records but as items of valuable property." United States Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 34 (1967). This view of the Department of Justice, not EPA's, reflects the existing rules and understandings that trade secrets are private property.<sup>30</sup>

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<sup>29</sup> In still another appeal to federal legislative power, EPA asserts that Monsanto's trade secrets are not property because "the proper functioning of the registration scheme depends upon uniform application to all data." EPA Brief at 28. It is difficult to comprehend how EPA's desire for symmetry bears on the meaning of property in the Taking Clause. Property rights are basically derived from state law and it is common for federal legislation to operate against a background of varying state laws. Moreover, in claiming that uniformity is desirable, EPA fails to point out any significant variation.

<sup>30</sup> EPA quotes dictum in *E.I. DuPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917), for the proposition that trade secrets are not property because "one policy" of trade secret law was to maintain ethical business dealings. EPA Brief at 29. In addition to the facts that *Masland* was decided prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and that in an earlier opinion the Court had treated trade secrets as property, *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 250-53 (1905) (Holmes, J.), the dictum in *Masland* does not support EPA. The issue in *Masland* centered on a dispute about the disclosure of trade secrets during trial preparation. The Court said only that it was irrelevant whether trade secrets (and trademarks) were property: "the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them." 244 U.S. at 102. See, e.g., *National Starch Prods., Inc. v. Polymer Indus., Inc.*, 79 N.Y.S.2d 357 (App. Div.), appeal denied, 81 N.Y.S.2d 278 (1948).

EPA similarly misapprehends the relevance of the Restatement of Torts § 757 (1939) definition of a "trade secret" and its explanatory comment a. See

[Footnote continued]

**C. Monsanto's Trade Secrets Are The Result Of An Enormous Commitment Of Time, Money And Effort.**

As previously indicated, EPA's position in the district court was different from its position here. By stipulating that Monsanto had "property rights" in trade secrets embodied in research and test data, EPA not only conceded the issue it now contests, but also obviated any need for proof on this subject. See pages 14-15 *supra*. Nevertheless, the record developed on other issues is sufficient to demonstrate why EPA made this admission and why in the district court EPA accurately viewed Monsanto's trade secrets as property.

The record shows, for example, that Monsanto's development of its trade secrets has required a massive commitment of resources and energy. In 1981 alone, the company spent \$70 million in its quest for new and better pesticides. J.A. 133. Despite these efforts, Monsanto's latest new herbicide—Roundup®—came on the market nearly nine years ago. Although Monsanto has registered only ten new herbicides under FIFRA since 1956, its rate of success is comparatively high.<sup>31</sup>

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EPA Brief at 29. Comment a simply describes the origins of trade secret protection and acknowledges the historic relationship to tort principles. This in no way detracts from the modern recognition of trade secrets as property. To the contrary, the Restatement definition is widely adopted in the decisions cited above holding that trade secrets are property as a matter of state law. See generally 1 R. Milgrim, *Trade Secrets* § 1.02 (1983)(collecting cases); see also *id.* at § 1.01[2]. The fact that misappropriation of a trade secret may be considered a tort no more lessens property rights in trade secrets than the fact that trespass is a tort renders real property unworthy of Fifth Amendment protection.

<sup>31</sup> Six of Monsanto's registered pesticides account for nearly all of the company's commercial success: Lasso®, Roundup®, Avadex®, Avadex®, BW, Ramrod® and Randox®. J.A. 112, 137-38. Throughout the world, very few new pesticides are introduced each year. In 1966, for example, there were only 28 new pesticides; by 1974, the number had fallen to 10. Goring, *The Costs of Commercializing Pesticides*, Int'l Conf. of Entomology, August 20, 1976, reprinted in *Hearings on FIFRA Extension Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition and Forestry*, 95th Cong., 1st Sess. 254 (1977).

The reasons for this become clear when one considers how new pesticides are developed.

Today there are thousands of pesticides registered under FIFRA, but most of these are end-use or formulated products, containing an identical or similar "active ingredient" combined with similar "inert ingredients" to dilute, dissolve, stabilize or otherwise improve the performance of the final product.<sup>32</sup> The great innovations have been with respect to "manufacturing-use products," which are generally pure forms of active ingredients used to produce final, formulated products. J.S. App. 4a-5a.<sup>33</sup> A company that undertakes basic research to devise such a new pesticide exposes itself to tremendous risks. *Id.* at 5a-6a. Any company that decides to engage in the development of new pesticides must assemble and organize a team of 150 to 500 highly trained scientists, provide research facilities and sophisticated equipment, and identify a widespread problem in agriculture that will continue to exist for the more than twenty years it may take the company to recoup its investment. J.A. 130-31; J.S. App. 5a-6a.

After identifying a problem, the company must devise "extremely efficient, unique and technically sound ways" of synthesizing and screening tens of thousands of new chemical compounds. J.S. App. 6a-7a. On the average, four to eight years will have passed and 20,000 compounds will have been synthesized and evaluated before the first potentially success-

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<sup>32</sup> Section 2(a)(1) of FIFRA, 7 U.S.C. § 136(a)(1)(1982), defines "active ingredient," in the case of pesticides other than plant regulators, defoliants and desiccants, as any "ingredient which will prevent, destroy, repel, or mitigate any pest." An "inert ingredient," under Section 2(m), 7 U.S.C. § 136(m)(1982), is "an ingredient which is not active."

<sup>33</sup> Prior to the enactment of FIFRA in 1947, nearly all such "manufacturing-use products" had been discovered by the federal government as part of the war effort. Not until 1950, when Dow Chemical Company introduced "Premerge," did companies begin extensive marketing of "proprietary" pesticides containing active ingredients created by private research. J.A. 126-27. Monsanto is engaged in the development and production of both end-use and manufacturing-use pesticide products.

ful candidate is discovered. *Id.* at 5a; J.A. 132.<sup>34</sup> Monsanto's superior research and testing techniques, however, have enabled it to become an industry leader in discovering potentially successful candidates on an average of 1 in every 10,000 compounds synthesized and screened. *Id.*

During the years of additional research that takes place between the identification of a commercial candidate and the anticipated initial marketing of the product, crop patterns may shift and weeds once prevalent may decline. J.A. 138-39; J.S. App. 5a. A product, if developed, may prove too expensive; further testing may indicate that environmental risks may result; or it may be impossible to provide the kind of consistent seasonal production that farmers require. J.A. 135-37. As a result, what once appeared to be a product worthy of development may be rejected as a "loser" after millions of dollars and years of effort have been expended.

In addition to these obstacles, it will take years to develop a feasible manufacturing process, construct a pilot plant, procure the capital needed and build adequate manufacturing facilities. J.A. 135. When a company does begin selling a new product, the return on investment must be substantial. The new pesticide must, of course, pay for the enormous costs incurred in developing it. J.A. 132. From 1960 through 1981, for example, Monsanto expended more than \$250,000,000 just in developing its relatively few successful pesticides. J.A. 142. But in marketing its new pesticide, a company must also recoup the losses incurred on the 19,999 losers. *See* J.A. 132.

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<sup>34</sup> One leading German company, for example, synthesized more than 94,000 compounds before coming up with its first commercial herbicide, which it now markets in the United States. J.A. 132. Monsanto discovered Roundup® 17 years after it began searching for a pesticide to control Johnson grass (J.A. 148); the product was not registered for crop use until 1976, 24 years after Monsanto began its search. *Id.* at 148-49. Monsanto "identified the target for which Lasso® was developed in the mid-1950's," did not obtain its initial registration for Lasso® until 1969, and still is engaged in substantial research aimed at expanding its uses. J.A. 45-46.

Generally, a total of 14 to 22 years will have passed from the time the company began synthesizing new chemicals until the resulting "product reaches a point where its costs of discovery, development and commercialization have been recovered." J.S. App. 5a.

In the course of researching and developing a new pesticide, the company will have conducted efficacy studies, phytotoxicity studies, metabolism and residue studies, environmental chemistry studies, toxicology studies, fish and wildlife studies, and manufacturing studies. J.S. App. 17a; J.A. 46-56, 144-47 (explaining the nature of such studies and their purpose). The resulting research and test data, and the trade secrets contained in it, must be furnished to EPA in order to register the pesticide under FIFRA. Over the years Monsanto has submitted such data and has thereby revealed to EPA, in confidence, the chemistry, metabolism, course of degradation, residues and interactions among ingredients of each pesticide Monsanto has developed. J.A. 144-47, 151-52.

These trade secrets are extraordinarily valuable, and their preservation is critical to the continuing viability of Monsanto's business. The company therefore maintains its research and test data under lock and key; employees are permitted access only on a need-to-know basis. Security guards are deployed around the clock and Monsanto personnel are required to execute security agreements respecting the data. J.A. 57, 147-48.

If Monsanto's research and test data were publicly released, the company would lose the innovative advantage gained through its research efforts. With Monsanto's trade secrets in hand, competitors could seek to reconstruct Monsanto's product formulas. J.A. 144-46; Tr. 192. Monsanto itself uses its trade secrets to improve the company's existing products and to develop new pesticides at a rate significantly above the industry average. J.A. 116; see page 23 *supra*. Monsanto has become a leader in sophisticated and unique technology that enables scientists to analyze particular molecules; information

revealing this secret technology developed by Monsanto is also contained within the research and test data the company has submitted to EPA. J.A. 141, 151-52. The metabolism studies on each Monsanto product, for example, enable the company to gain valuable "insights into how it works, what we should be doing to build the next molecule, and how . . . we make the present compound work better." J.A. 151. Monsanto's trade secrets provide important leads not only for discovering new pesticides, but also for expanding the uses of existing products, which is just as critical. J.A. 45-46. If the trade secrets Monsanto has submitted to EPA were disclosed, Monsanto's competitors would be able to obtain those leads for themselves (J.A. 102; Tr. 102, 256 (confidential)) as well as secure registrations of their pesticides in foreign countries and even register their competitive products for expanded uses in the United States.<sup>35</sup>

**D. EPA's Arguments That Monsanto's Trade Secrets Should Not Be Considered "Property" Conflict With The Taking Clause.**

In light of the foregoing, it is remarkable for EPA now to contend that Monsanto's trade secrets are not property. In so arguing, EPA has failed to offer any coherent analysis of the meaning of "property" in the Taking Clause. Instead, it simply lists a variety of unrelated considerations that have little, if anything, to do with whether Monsanto has property rights in its trade secrets, a point EPA conceded in the lower court. Much of what EPA now has to say in this regard not only is irrelevant to the issue EPA purports to address, but also is in conflict with the function of the Taking Clause in our system of government.

Although apparently recognizing that Monsanto's trade secrets constituted property so long as the company did not use

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<sup>35</sup> J.S. App. 23a; J.A. 140-43. Monsanto competes not only with United States companies seeking to devise new pesticides, but also with companies in West Germany, Switzerland, the United Kingdom and Japan. J.A. 143.

them to register pesticides under FIFRA, EPA first contends that because Monsanto "chose to reveal" its data, the company "accepted the conditions" that the data would be disclosed and used by the company's competitors. EPA Brief at 27. It is unclear whether EPA is arguing that Congress intended to treat trade secrets submitted under FIFRA as something other than property or that Monsanto somehow "waived" its Fifth Amendment rights in the property. In either event, EPA's assertion, which it rests on the supremacy of federal legislation, is in error.

EPA cannot support its position by relying on FIFRA. The 1978 FIFRA amendments themselves reflect Congress' view that trade secrets in research and test data are property. When Congress amended the statute in 1978, it recognized that data developers like Monsanto had a continuing "proprietary interest" in their data after they furnished it to EPA, S. Rep. No. 334, 95th Cong., 1st Sess. 31 (1977), and were "entitled," in the words of the Conference Committee, to "compensation" because they "have legal ownership of the data." H.R. Rep. No. 1560, 95th Cong., 2d Sess. 29 (1978). Indeed, EPA informed Congress that the data "has a continuing commercial value beyond its value in achieving the immediate registration for which it was developed"; although consistent with the record in this case, EPA's statement contradicts what EPA now represents to this Court.<sup>36</sup>

Congress thus knew full well that the owners of trade secrets had property interests in their data, interests that de-

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<sup>36</sup> Statement of Douglas M. Costle, Administrator, Environmental Protection Agency, in H.R. Rep. No. 343, 95th Cong., 1st Sess. 8 (1977); H.R. Rep. No. 663, 95th Cong., 1st Sess. 59 (1977); S. Rep. No. 334, 95th Cong., 1st Sess. 72 (1977). EPA's statement quoted in the text and its admission to both Houses of Congress that it had no expertise in determining the economic value of such research and test data (*id.*; see also 123 Cong. Rec. 25710 (1977) (remarks of Sen. Leahy)), contrasts sharply with its unsupported statement to the Court that the "principal value of the data to Monsanto is the competitive advantage derived from obtaining a registration." EPA Brief at 31.

serve "just compensation," as the Senate floor leader stated when explaining the amendments to the Senate. 123 Cong. Rec. 25709 (1977)(remarks of Senator Leahy). But Congress incorrectly believed that "[d]etermining the amount and terms of such compensation are matters that do not require active governmental involvement. . . . The compensation payable should be determined to the fullest extent practicable, within the private sector." *Id.*

The point here is not that the Taking Clause rejects this treatment of private property, which it does, but that in the 1978 FIFRA amendments Congress did not attempt to remove trade secrets from the realm of "private property" and would not have had the power to do so in any event. EPA's suggestion otherwise is simply mistaken. Congress instead assumed that it could avoid having the federal government provide compensation for EPA's *disclosure* of trade secrets because it had set up a private compensation scheme relating to the *use* of such property for registering competitors' products. See S. Rep. No. 334, 95th Cong., 1st Sess. 41 (1977); H.R. Rep. No. 663, 95th Cong., 1st Sess. 18-19 (1977).

It is of course true, as EPA points out, that conflicting state laws must give way to federal statutes enacted pursuant to Congress' authority under the Commerce Clause. EPA fails to recognize, however, that while Congress may thereby preempt state law, it cannot preempt the Fifth Amendment. Justice Jackson made the point forcefully: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. . . . One's right to . . . property . . . may not be submitted to vote," *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Monsanto's property rights may be "solely a question of federal law" (EPA Brief at 28), but that federal law is the Fifth Amendment, not FIFRA as EPA assumes.<sup>37</sup>

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<sup>37</sup> As Monsanto has argued, "[t]hough the meaning of property as used in . . . the Fifth Amendment is a federal question, it will normally obtain its

[Footnote continued]

To hold otherwise would be to emasculate the Taking Clause. If Congress were the arbiter of the meaning of "private property" under the Taking Clause, federal legislation destroying property rights could always be considered a mere redefinition of property rather than a "taking." In light of the federal government's nearly unbounded capacity to regulate commerce, there would then be nothing to constrain Congress from using its legislative authority to promote the common good by forcing owners to sacrifice their property, including trade secrets. See *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979).<sup>38</sup> That is precisely the opposite of what the Framers intended, as the Court recognized in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980), when it stated "[n]or as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."

EPA's related claim that Monsanto's trade secrets are not property because the company "accepted the conditions" imposed by the 1978 FIFRA amendments (EPA Brief at 18, 27) does no more than state a theory. If Congress had the power to destroy Monsanto's trade secrets without just compensation, EPA's "waiver" argument would be unnecessary. If, as contended above, Congress did not have such power because of the Taking Clause, EPA's statement that Monsanto "consented" is merely fiction. Two things are certain. First, as EPA acknowledges in its regulations, the data at issue here was in no sense "voluntarily submitted." See 40 C.F.R. § 2.307(g)(1982) ("no information to which this section applies is voluntarily submitted information"). Second, Monsanto no more accepted the destruction of its trade secret property by registering its pesticides than the building owner in *Loretto v.*

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content by reference to local law." *TVA v. Powelson*, 319 U.S. 266, 279 (1943). Accord, *United States v. Causby*, 328 U.S. 256, 266 (1946).

<sup>38</sup> Even state governments do "not have unlimited power to redefine property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). See also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

*Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), "consented" to a CATV installation by becoming a landlord subject to state regulation, than the petitioners in *Armstrong v. United States*, 364 U.S. 40 (1960), "accepted the condition" of having their right to assert a lien destroyed by supplying materials to the manufacturer of boats for the United States, or than the owner of mineral rights in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "consented" to the regulations there at issue by choosing to engage in the coal mining business.

To accept EPA's consent theory would be to sanction any governmental regulation of business that destroys property. While EPA emphasizes that the FIFRA amendments still protect Monsanto's manufacturing processes and product formulas (EPA Brief at 17), its arguments would empower Congress to take even this property freely or, indeed, any other property that Monsanto owns. Contrary to EPA's position (EPA Brief at 18, 27), so long as the Fifth Amendment stands, the relinquishment of private property cannot be deemed a condition of engaging in interstate commerce.<sup>39</sup>

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<sup>39</sup> See L. Tribe, *American Constitutional Law* § 9-5, at 465 (1978) (pointing out the fallacy of the argument that government regulation may be upheld against a Taking Clause challenge by the mere device of characterizing the regulation as a "condition").

The courts have long recognized that the "Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit." *Standard Airlines, Inc. v. CAB*, 177 F.2d 18, 20 (D.C. Cir. 1949). *Accord, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 439 n.17 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation"); *Frost & Frost Trucking Co. v. Railroad Comm'n of Calif.*, 271 U.S. 583, 593 (1926) ("[i]n reality the carrier is given no choice . . . an option to forego a privilege which may be vital to his livelihood or to submit to a requirement which may constitute an intolerable burden"); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983) (city's refusal to vacate platted streets unless plaintiff's geothermal wells were conveyed as exchange held to be an unconstitutional condition).

EPA's further contention that the legislation at issue here defines the "duties of a federal agency" (EPA Brief at 28) is irrelevant to the question whether Monsanto's trade secrets are property. A statute requiring a federal agency to confiscate a company's production facilities rests on no better footing than federal legislation directly ordering the company to relinquish its means of production. In neither instance does the nature of the regulation or the party to whom it is directed transform property into something outside the purview of the Taking Clause. Despite EPA's claims, it would make no difference under the Taking Clause if, instead of placing duties on EPA, FIFRA directly required Monsanto to unlock its research files so that any interested private citizen could browse or ordered Monsanto to mail its research and test data to rival firms so that they could register competing products.

This leaves only EPA's argument that prior to 1978, Monsanto had no "reasonable expectation" that Congress would refrain from requiring the use or disclosure of the company's data. EPA Brief at 29-32. Once again, it is far from clear how anything EPA states in this respect pertains to the constitutional issue EPA ostensibly addresses—whether Monsanto's trade secrets are "property" within the meaning of the Taking Clause. EPA's claim, for example, that "the 1978 Amendments requiring disclosure do not defeat an interest of independent significance" (EPA Brief at 32), itself lacks significance. While converting Monsanto's trade secrets into public information would have enormous financial significance for the company, this relates to the "taking" question, not whether Monsanto's trade secrets constituted property before they were so destroyed.

As shown above, Monsanto's "expectations" are derived not from FIFRA, but from its property rights under state law and "existing rules or understandings" that define property under the Fifth Amendment.<sup>40</sup> EPA's position that FIFRA creates

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<sup>40</sup> There is nothing to EPA's quarrel (EPA Brief at 8 n.8, 30 n.25) with the district court's finding that under the USDA's administration of FIFRA, trade secrets were fully protected. See page 4 & note 7 *supra*.

no expectations is thus beside the point. Congress does not have plenary authority to destroy Fifth Amendment expectations. In arguing otherwise, EPA merely restates its mistaken view of the preeminence of federal legislative power over rights in property protected by the Taking Clause. In this regard, it is frivolous for EPA to contend that the importance of trade secrets to Monsanto stems from the FIFRA licensing system, which EPA says Congress may freely modify. EPA Brief at 31-32. If FIFRA were repealed tomorrow, if registration of pesticides were no longer required, Monsanto most certainly would not unlock its files and throw open its trade secrets to the world. Research and testing at Monsanto would necessarily proceed and its trade secret property would continue to be protected; Monsanto could not otherwise survive.<sup>41</sup>

## II. THE 1978 FIFRA AMENDMENTS TAKE MONSANTO'S TRADE SECRET PROPERTY.

The use and disclosure provisions enacted in the 1978 FIFRA amendments operate to "take" Monsanto's trade secret property according to well-established Fifth Amendment principles. Whether private property has been taken necessarily depends upon the nature of the property<sup>42</sup> and the owner's

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<sup>41</sup> Regardless of what federal legislation provided, the research and testing Monsanto conducts would be necessary to the development of any pesticide. There are, throughout the world, two basic conditions that a potential pesticide must meet before it can be considered commercially acceptable: the product must be effective in preventing damage by a pest and its use for the intended purpose must not cause harm to those applying the pesticide, to the product it is designed to protect, or to the environment. See F. McEwen & G. Stephenson, *The Use and Significance of Pesticides in the Environment* 63-72 (1979). These conditions can only be established through the kind of research and testing that, in this country, generates the data submitted pursuant to FIFRA. *Id.*

<sup>42</sup> The Court's decisions involving the taking of intangible property have consistently recognized the special nature of such property. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 44 (1960)(supplier's liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-97 (1935) (real estate liens); *Lynch v. United States*, 292 U.S. 571, 579 (1934)(contracts); *United States v.*

[Footnote continued]

rights in that property.<sup>43</sup> For the owners of trade secrets, the existence of their property is defined by their "right to exclude." The trade secret owner, of course, cannot prevent others from fairly and independently developing the same information, but the very essence of property in *his* trade secret is "the power to make use of it to the exclusion of the world." *Hartley Pen Co. v. United States District Court*, 287 F.2d 324, 328 (9th Cir. 1961) (quoting *Cincinnati Bell Foundry Co. v. Dodds*, 10 Ohio Dec. Reprint 154 (Super. Ct. 1887) (Taft, J.)). See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974); *Painton & Co. v. Bourns, Inc.*, 442 F.2d 216, 223 (2d Cir. 1971); 1 R. Milgrim, *Trade Secrets* § 5.04[1] (1983). Quite simply, unless the owner of a trade secret maintains its confidentiality, he has no property. *Kewanee Oil*, 416 U.S. at 484.

Ignoring the nature of trade secret property, EPA once again invites the Court to weigh the interests of "the public" and those of Monsanto. EPA Brief at 33, 34-35, 38, 39. Monsanto has emphasized before that EPA's balancing test conflicts sharply with the Taking Clause. See pages 13-14 *supra*. The Taking Clause rejects EPA's notion that whether private property has been taken turns on how felicitous the purpose of the legislation happens to be. Whatever the outcome of EPA's "balancing test," the exercise is irrelevant to the taking of property in violation of the Fifth Amendment.<sup>44</sup>

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*General Motors Corp.*, 323 U.S. 373, 378 (1945)(lease). Cf. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (contract rights constitute Fifth Amendment property).

<sup>43</sup> Since the property involved differs greatly from case to case, as does the governmental action affecting the property, the Court has not formulated any single test for determining whether there has been a taking. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 164, 175 (1978).

<sup>44</sup> As Professor Michelman explained in *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1193-94 (1967), the balancing test "cannot have anything to do with the" question whether a taking has occurred. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373 (1945)(war department's taking of leasehold interest in manufacturing plant); *United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951)(wartime seizure of coal mine).

What is relevant here is the combined "practical effect" of the FIFRA amendments, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 169 (1980), which order Monsanto to open its research files to anyone who wishes to remove the trade secrets contained therein and require Monsanto to deliver its hard-earned trade secrets to any rival firm that desires to use this Monsanto property to market competing products. Under Sections 10(b) and (d), and the last sentence of Section 3(c)(2)(A) as amended, EPA must make "available for disclosure to the public" within 30 days the registrant's trade secrets, including all of those relating to pesticide chemistry, metabolism and testing methodology. While EPA attempts to minimize the devastating consequences of these provisions by characterizing the recipients of Monsanto's trade secrets as "qualifying members of the public" or "certain classes of persons" (EPA Brief at 3, 37), the only private persons not so "qualified" are multinational and foreign pesticide firms.<sup>45</sup>

Pursuant to these provisions, Monsanto's trade secret property would flow freely into the hands of any other company, "interest group," entity, or individual who desires it and from there into trade journals and other publications. Indeed, the *amicus* briefs filed in support of EPA highlight this fact. It is thus clear from the record that by both direct and indirect routes, Monsanto's business competitors can and would receive Monsanto's trade secrets, and the district court so found. J.S. App. at 21a-22a; Trial Exhs. 14, 47-51; Tr. 218, 250-51.

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<sup>45</sup> See note 10 *supra*. Section 10(g), by its terms, does not exclude domestic firms, foreign governments, foreign or multinational firms who do not produce or sell pesticides outside the United States, or other foreign non-business entities from the category of "qualified members of the public" (to borrow EPA's description) entitled to Monsanto's trade secrets. The provision specifically bars only firms "engaged in the production, sale or distribution of pesticides in countries other than the United States or in addition to the United States." 7 U.S.C. § 136h(g)(1982).

Monsanto, which is a multinational firm, is therefore not entitled to receive another company's trade secrets under Section 10(g). If Monsanto desires such property, it must pay for the trade secrets.

Having obtained Monsanto's trade secrets, such competitors would be able to destroy Monsanto's hard-earned innovative advantage by duplicating its technology, gaining leads for reconstructing its product formulas and for research into new compounds, developing new pesticides that Monsanto research had uncovered, and expanding uses for their competing products and registering their competitive pesticides abroad.<sup>46</sup> See pages 24-25 *supra*.

With respect to the use provision, EPA's insistence that Monsanto's trade secret property is not taken conflicts with the very legislation EPA defends. Section 3(c)(1)(D) provides that when one company registers its pesticide by using research and test data owned by another, the owner is entitled to compensation. Congress had no authority to define "property" for purposes of the Fifth Amendment, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980), and in enacting Section 3(c)(1)(D), Congress had no choice but to legislate in light of the "existing rules or understandings" that determine property interests. *Board of Regents v. Roth*, 409 U.S. 564, 577 (1972). See pages 15-19 *supra*. Consistent with these rules and understandings, Congress stated that companies like Monsanto retained "legal ownership" of their trade secrets after EPA received their data, that these companies had a continuing "proprietary interest" in their property and that the use provision eliminated the trade secret owner's "exclusive property."<sup>47</sup> This is why Congress set up an arbitration scheme requiring "piggyback" registrants to pay the owner for using

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<sup>46</sup> The existence of the patent laws does not bear on whether trade secrets are taken under FIFRA. As the record demonstrates, patents on newly-discovered pesticide compounds are normally applied for early in the process and before much of the data submitted to support registration is developed. J.A. 159-61. The patent laws are irrelevant to the trade secrets at issue here; these unpatented trade secrets are not disclosed in the patent application. J.A. 165-68. See *Johnson v. HEW*, 462 F. Supp. 336 (D.D.C. 1978).

<sup>47</sup> H.R. Rep. No. 1560, 95th Cong., 2d Sess. 29 (1978) (Conf. Report); S. Rep. No. 334, 95th Cong., 1st Sess. 31 (1977); H.R. Rep. No. 663, 95th Cong., 1st Sess. 41 (1977).

his property, and it is why Section 3(c)(1)(D)(ii) itself speaks of an owner's "right to compensation." Rather than supporting EPA, the legislative history of the FIFRA amendments simply confirms Congress' understanding that it was eliminating property rights, thereby destroying advantages gained by data owners through hard-earned innovation and an enormous commitment of resources. See *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905) (Holmes, J.).<sup>48</sup>

Among the few hard and fast rules set down under the Taking Clause, the Court has established one that is conclusive here: "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); see also *Loretto v. Teleprompter Manhattan*

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<sup>48</sup> EPA extols the FIFRA amendments as a means to "reduce barriers to entry by allowing subsequent applicants to obtain registrations for products . . . without duplicating the data EPA already has in its possession." EPA Brief at 37. Even if this purpose made a difference under the Taking Clause, which it does not, the FIFRA amendments do not reduce barriers to entry. Instead, they create them.

A "barrier to entry" faces a company if its long-run costs of doing business are higher than the costs of another company in producing the same product. See, e.g., G. Stigler, *The Organization of Industry* 67-70 (1968); 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 409a (1978); Demsetz, *Barriers to Entry*, 72 Am. Econ. Rev. 47 (1982). Because Monsanto now has to bear the costs (and run the risks) of creating trade secret research and test data while rival firms do not, the FIFRA amendments create a barrier to entry for firms like Monsanto. Prior to the 1978 changes in the law, all firms were treated equally.

EPA thus misuses the "barrier to entry" principle to refer to high start-up costs. As so used, it does nothing to advance EPA's constitutional arguments. No one, for example, would contend that because Monsanto has to build and operate a large and expensive plant in order to manufacture pesticides, Congress could force Monsanto to make pesticides for other, smaller companies in its plant. The Taking Clause would stand in the way of such regulation, as the Framers intended, just as it stands in the way of the FIFRA amendments at issue in this case.

*CATV Corp.*, 458 U.S. 419, 435 (1982). For the owner of trade secret property, his right to exclude others, which the FIFRA amendments take away, is not merely "one of the most essential sticks in the bundle of rights that are commonly characterized as property," it is *the* essential stick. *Loretto*, 458 U.S. at 433 (quoting *Kaiser Aetna*, 444 U.S. at 176).<sup>49</sup> If the trade secret owner cannot exclude others, if he must share his trade secrets with the world, he has no property. See page 32 *supra*; 1 R. Milgrim, *Trade Secrets* § 2.03 at 2-22 (1983); e.g., *Drew Chemical Corp. v. Star Chemical Co.*, 258 F. Supp. 827, 834 (W.D. Mo. 1966).<sup>50</sup>

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<sup>49</sup> *PruneYard Shopping Center v. Robins*, which EPA cites, lends no support to EPA. The Court there distinguished *Kaiser Aetna* on the basis that the federal government, unlike the states, had no authority to define "property" under the Taking Clause. 444 U.S. at 84. Moreover, in *PruneYard*, the state-created rights of speech of some private parties were set against the rights of another private party under the Fifth Amendment. The Court resolved this clash against the shopping center owners because they had "failed to demonstrate that the right to exclude others is so essential to the use or economic value of their property." *Id.* at 84. As the Court later explained in *Loretto*, the state-authorized limitation on the property owners in *PruneYard* was only temporary and therefore did "not absolutely dispossess the owner of his rights to use, and exclude others from, his property." 458 U.S. at 435 n.12. In this case, however, FIFRA authorizes the permanent destruction of Monsanto's right to exclude others from its trade secrets, which—unlike *PruneYard*—is indeed a right essential to the economic value of the property.

<sup>50</sup> Citing *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431-32 (1919), EPA argues that a manufacturer has no constitutional right to sell products without giving the consumer "fair" information about what is being sold. EPA Brief at 39. To the extent EPA is suggesting that the government has constitutional authority to regulate product labeling in order to prevent misbranding—which was the issue in *Corn Products*—EPA's argument is correct but irrelevant. On the other hand, if EPA means to suggest that the Fifth Amendment places no restraints on the government's taking of trade secrets, EPA's theory flies in the teeth of the cases discussed in the text. Such a theory would obviously read the Taking Clause out of the Constitution and render meaningless the Fifth Amendment principles that, as EPA itself acknowledges (EPA Brief at 33-34), govern whether a taking occurred.

Not only do the FIFRA amendments take Monsanto's trade secret property by eliminating its right to exclude, but also public disclosure of the trade secrets destroys the property root and branch. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 484 (1974). This Court has consistently held that such a complete and irrevocable destruction of intangible property is a taking. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 46 (1960)(materialman's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (real estate liens); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)(mineral rights).<sup>51</sup> The manner in which the FIFRA amendments destroy Monsanto's property—by transferring Monsanto's trade secrets to the public and Monsanto's competitors—flies in the face of this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), that "a State, by *ipse dixit*, may not transform private property into public property without compensation." Neither may the federal government. To borrow Justice Brandeis' description in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79 (1937), the FIFRA amendments present a "glaring instance of taking of one man's property and giving it to another."

Instead of addressing these points, EPA seeks to deflect attention away by focusing not on what has been taken, but on what supposedly remains after the FIFRA amendments. Although EPA concedes that Monsanto has been deprived of its right to exclude and acknowledges that a taking occurs when a regulation destroys all "property rights" (EPA Brief at 33, 35),

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<sup>51</sup> Trade secret property rights are not just diminished, but obliterated, by public disclosure which is a conclusive "factor pointing toward government disclosures of trade secrets as takings." Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 Wis. L. Rev. 207, 251. See *Harrington v. National Outdoor Advertising Co.*, 196 S.W.2d 786, 791 (Mo. 1946); see generally 1 R. Milgrim, *Trade Secrets* § 2.03 (1982) ("[t]he value, then, of a trade secret rests in the maintenance of secrecy"). See also Note, *Constitutional Limitations on Government Disclosure of Private Trade Secret Information*, 56 Ind. L.J. 347, 364-68 (1981).

it tries to soften FIFRA's impact by listing remaining interests that are in no sense incident to Monsanto's property rights in its trade secrets. EPA's argument that Monsanto "retains significant rights" in its data despite FIFRA (*id.* at 35) is wrong on several counts. The argument ignores the undeniable fact that Monsanto would retain none of its trade secret property embodied in this data. The argument fails as well because, in stating it, EPA is forced to use the adjective "significant" rather than "valuable" to describe Monsanto's supposed remaining rights. The destruction "of all value" in intangible property constitutes a taking, *Armstrong v. United States*, 364 U.S. at 48, and EPA surely knows as well as anyone that Monsanto's trade secrets become worthless when they are released to the world. Only a fool would pay Monsanto for something EPA gives away merely for the asking.

EPA, in short, does nothing but confound the subject when it asserts that Monsanto "retains the right" to exploit "the data" and to use it. EPA Brief at 35.<sup>52</sup> Whatever rights Monsanto had in its trade secrets will become public rights as a result of FIFRA.<sup>53</sup> Indeed, if there were any validity to EPA's novel "retained rights" theory, the Court would have decided *Kaiser Aetna* in favor of the United States because the owner there "retained significant rights" to sail on "his" pond and to swim and to fish in the pond even after the government opened it to the public. But what the government attempted to take from the owner of Kuapa Pond is precisely what FIFRA takes from Monsanto: the right to exclude others. Being forced to

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<sup>52</sup> Rather than retaining rights, Monsanto is exposed to potential liability as a result of the use provision. If a manufacturer who registered a pesticide by using Monsanto research and test data markets the product without adequate quality controls, an injured party might join Monsanto in a product liability suit. Such a careless manufacturer could conceivably even advertise its poorly-made product by proclaiming that it was backed by Monsanto research.

<sup>53</sup> As a matter of trade secret law and common sense, Monsanto does not retain any trade secrets once they have been disclosed. See page 32 *supra*.

share one's property with others is, in Madison's words, being "obliged to relinquish" the property. As *Kaiser Aetna* firmly establishes, that constitutes a taking within the meaning of the Fifth Amendment no matter how reasonable the government's intentions may otherwise appear.<sup>54</sup> See note 17 and pages 32-34 *supra*; *United States v. Causby*, 328 U.S. 256 (1946) (owner's retention of land after taking of easement does not avoid the taking).

Similarly, when EPA argues that Monsanto has been given the "valuable replacement right" of payment by competitors who use its property to register their pesticides (EPA Brief at 36), EPA at once confirms that Monsanto's property has been taken and that the Fifth Amendment has been violated. To the extent that its property is taken for a "public use," Monsanto is entitled to a "replacement right" but it is not the one FIFRA provides.<sup>55</sup> Although the Fifth Amendment requires that "just compensation" be provided in such circumstances, FIFRA

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<sup>54</sup> There is nothing to EPA's argument that the FIFRA amendments themselves deprive Monsanto of "investment-backed expectations" in its trade secret property. EPA Brief at 33-34. The argument is circular: EPA contends in effect that Monsanto's property has not been taken because, after FIFRA, Monsanto has no compensable property. There is no functional difference between EPA's argument in this regard and its contention, which is discussed above at pages 26-31, that Monsanto has no property because it consented to having its trade secrets used and disclosed. Only this bears adding. If Congress passes a statute taking private property for a public use, the owner may no longer have any expectations that he will continue to own the property. That, however, cannot render the statute constitutional if Congress fails to provide just compensation, as it has failed to do here. See *Webb's Fabulous Pharmacies*, 449 U.S. at 164. Every property owner is entitled to expect that the government will not take his property unless he is so compensated and that expectation is one legislation may not extinguish so long as the Fifth Amendment stands.

<sup>55</sup> Moreover, the replacement value EPA ascribes to FIFRA's ten-year exclusive use period applies only for research and test data supporting the registration of pesticides containing a new active ingredient first registered after September 30, 1978. As discussed above, there are very few new active ingredients introduced, and Monsanto's latest product in this category was registered in 1975. See page 21 *supra*. The provision thus provides no replacement value to Monsanto. In addition, the amended disclosure provi-

[Footnote continued]

provides nothing when Monsanto's property is destroyed through public disclosure, it provides nothing when others take advantage of Monsanto's trade secrets outside the registration process and, as EPA has now conceded (*see* pages 40-41 & note 56 *infra*), it provides less than "just compensation" when other private companies use Monsanto's property in order to market their competing products.

### III. "JUST COMPENSATION" IS NOT PROVIDED FOR THE TAKING OF MONSANTO'S TRADE SECRET PROPERTY.

The preceding discussion establishes that Monsanto's trade secrets are "private property" and that this Monsanto property is taken under FIFRA. Since EPA agrees that private arbitration under FIFRA does not satisfy the Fifth Amendment's mandate that "just compensation" be provided (*see* J.S. 23-24, 25; EPA Brief at 44, 46 n.32),<sup>56</sup> all that remains is EPA's

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sions compel revelation of the trade secrets relating to new "active ingredients" and impose no restrictions upon their use by competitors for purposes other than FIFRA registration. *See* pages 7-8 *supra*.

<sup>56</sup> "Just compensation" for the taking of trade secrets must be the "full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). As EPA points out, the arbitration scheme, rather than compensating Monsanto for the value of its trade secrets, only provides compensation for part of Monsanto's "costs of performing tests." EPA Brief at 44. Moreover, FIFRA provides no compensation in many instances when trade secrets are taken. *See* pages 7-8 *supra*. In addition, private arbitrators decide the compensation under FIFRA, yet determining "just compensation" is inherently a judicial inquiry, which not even Congress or the Executive Branch may assume. *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). Finally, the scheme would violate the Constitution because the arbitration panel cannot even be considered an Article I tribunal. *See* note 11 *supra*. Compare *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), with *Buckley v. Valeo*, 424 U.S. 1 (1976).

In light of EPA's concession that the arbitration scheme was not meant to provide "just compensation," Monsanto agrees that there are no other constitutional issues regarding this aspect of FIFRA now properly before the Court and that such issues would not be ripe for adjudication in any event. EPA Brief at 44-45.

claim that Monsanto can recover "just compensation" under the Tucker Act (28 U.S.C. § 1491) by suing the United States in the Claims Court each time its trade secret property is disclosed or used pursuant to FIFRA. For the reasons that follow, the district court correctly rejected EPA's argument and properly enjoined the FIFRA amendments. J.S. App. 34a-36a.

Although EPA does not rely on FIFRA's arbitration scheme to show that "just compensation" is available (EPA Brief at 46 n.32), the scheme remains highly significant to the "just compensation" question. The provisions added to FIFRA in 1978 and their legislative history show not only that Congress designated arbitration as the exclusive means of recompensing trade secret owners for their property, but also that any judicial remedy outside the statute would conflict with FIFRA's design.

Under Section 3(c)(1)(D)(ii), competitors who use Monsanto's property must offer to pay Monsanto and to submit to binding arbitration. This offer to arbitrate is one that companies like Monsanto cannot refuse. If Monsanto or any other company that has supplied research data to EPA rejects the "piggyback" registrant's offer to arbitrate, FIFRA strips the owner of any right to be paid. Section 3(c)(1)(D)(ii) so provides in the clearest possible terms: any company refusing to arbitrate "shall *forfeit* the right to compensation for the use of the data in support of the application." 7 U.S.C. § 136(a)(c)(1)(D)(ii)(1982) (emphasis added).

In devising this private arbitration scheme, Congress had a number of objectives in mind. First, Congress concluded that the economic impact of destroying trade secrets through Section 10 public disclosure, which could stifle research and development, must be mitigated by requiring "piggyback" registrants to pay something for using the trade secret owner's data under Section 3. *See* S. Rep. No. 334, 95th Cong., 1st Sess. 41 (1977) (justifying the economic impact of disclosure on the basis that the data developer will be paid if another company uses the data to register a competing product). Second,

Congress wanted to put an end to what it and EPA viewed as intrusions by the courts in suits involving the status of trade secrets under FIFRA. See H.R. Rep. No. 343, 95th Cong., 1st Sess. 7-8 (1977); H.R. Rep. No. 663, 95th Cong., 1st Sess. 18 (1977). The House and Senate versions of the bill therefore provided that arbitration would be final, conclusive and not subject to further appeal in the courts. H.R. Rep. No. 1560, 95th Cong., 2d Sess. 31-32 (1978)(Conference Report). The provision was enacted in this form, with a slight modification to allow for judicial intervention solely in the event of fraud or misconduct by a party or an arbitrator. Third, Congress intended that the money to compensate data submitters come from the private sector, not the Treasury; data submitters were to receive whatever they could garner from their competitors in arbitration and nothing more. See S. Rep. No. 334, 95th Cong., 1st Sess. 17 (1977). After FIFRA's exclusive use and compensation periods expire, Section 3(c)(1)(D)(iii) thus provides "that there shall be no compensation at all" for the takings.<sup>57</sup>

To suggest, as EPA does, that despite these provisions trade secret owners may litigate their taking claims against the United States in the Claims Court is to contradict this legislation. It would be fundamentally inconsistent with Congress' design to subject trade secret owners to the penalty of forfeiting their "right to compensation" for refusing to arbitrate if they were entitled to be proceeding in the Claims Court in any event. Moreover, Congress hoped to avoid even arbitration proceedings by forcing the owner and the user to first negotiate over the amount to be paid. See FIFRA § 3(c)(1)(D)(ii). It is difficult to see how such negotiations could ever be fruitful when, regardless of the outcome, the owner could be fully compensated through the Claims Court, as EPA suggests. In addition, if EPA's argument were correct, there

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<sup>57</sup> *Amchem Prods., Inc. v. Costle*, 481 F. Supp. 195, 199 (S.D.N.Y. 1979), *rev'd on other grounds sub nom. Union Carbide Agricultural Prods. Co. v. Costle*, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981).

is no reasonable explanation why Congress would ever have required "piggyback" registrants to pay a company for using its property. The research and test data would have been subject to public disclosure under Section 10 after the company first registered its product, long before any "piggyback" applications began reaching EPA, and by the time arbitration with the "piggyback" registrant took place, the data submitter could already have recovered on a judgment from the Claims Court awarding just compensation. Indeed, potential "piggyback" registrants would have every incentive to delay filing an application until the United States had fully compensated the owner for the loss of his trade secret property resulting from EPA's disclosing it. The only rational system in such circumstances would be for the "piggyback" registrant to indemnify the United States, but there is no such provision in FIFRA.

Still further, Congress would be shocked to learn that in passing amendments designed to prevent trade secret litigation under FIFRA, it had instead spawned an endless stream of such suits. Yet that is the gist of EPA's Tucker Act argument. According to EPA, each time a trade secret is taken under FIFRA, a cause of action for just compensation accrues in the Claims Court. EPA Brief at 43-44 n.31.

Citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), EPA contends that the proper inquiry is whether Congress withdrew the Tucker Act grant of jurisdiction to the Claims Court. EPA Brief at 41-42. That was the question in the *Rail Cases* but EPA ignores the reason why. With respect to the Rail Act, the Court decided that a Tucker Act remedy *could* co-exist with the statutory scheme, particularly since Congress had indicated a willingness to pay just compensation by appropriating tens of millions of dollars for this purpose. See 419 U.S. at 128-29, 133-34. In regard to FIFRA, however, suits in the Claims Court for takings of trade secret property would be inconsistent with the statutory scheme and Congress' purposes, as the legislative history reveals. For FIFRA, Congress appropriated not a cent to provide just compensation because all compensation was to come from the private benefi-

ciaries. If Congress had thought that FIFRA's use and disclosure provisions were to be implemented at public expense, it might have decided that the drain on the Treasury from FIFRA's taking of trade secrets would be too great. That, of course, is a judgment only Congress could make, despite the ostensible willingness of EPA to have the public shoulder such a huge financial burden. See EPA Brief at 44. But it is a judgment Congress did not make. Contrary to EPA's arguments, Congress decided that private arbitration was to be the exclusive means by which "just compensation," or indeed any compensation, would be provided to trade secret owners under FIFRA. 123 Cong. Rec. 25709 (1977) (Sen. Leahy).

Moreover, in contrast to the Rail Act, there is further evidence regarding FIFRA that Congress did not intend the Tucker Act to be available. One year after passage of the Rail Act of 1973, Congress enacted the Congressional Budget Act requiring, for the first time, the Congressional Budget Office to estimate what the five-year cost would be of any proposed legislation. 31 U.S.C. § 1353 (Supp. V 1981). These cost estimates must be included in each House and Senate committee report accompanying any public bill, thus enabling the members to vote on proposed legislation in light of how much it would drain the Treasury. The Congressional Budget Office's estimate accompanying both the Senate and House committee reports on the 1978 FIFRA amendments project *no* costs resulting from Tucker Act judgments against the United States. See H.R. Rep. No. 663, 95th Cong., 1st Sess. 71-73 (1977); S. Rep. No. 334, 95th Cong., 1st Sess. 116-17 (1977). Thus, when the members of the Senate and House voted on the 1978 FIFRA amendments, they did so on the basis that there would be no Claims Court judgments against the United States for FIFRA's takings of private property.<sup>58</sup> In short, to accept

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<sup>58</sup> In contrast, when Congress passed the Rail Act in 1973, it was not required to project costs over the next five years, *Regional Rail Reorganization Act Cases*, 419 U.S. at 127-28, as the Congressional Budget Act of 1974 necessarily required Congress to do when it considered the 1978 FIFRA amendments.

EPA's contention that the Tucker Act provides relief for FIFRA's taking of trade secret property would be to conclude that the Members of both Houses of Congress had been deceived when they voted on this legislation in light of its projected costs.

The Tucker Act therefore is not available to cure FIFRA's failure to provide "just compensation" as the Fifth Amendment requires, and the district court properly enjoined EPA from implementing the statute's use and disclosure provisions.<sup>59</sup>

#### IV. THE 1978 FIFRA AMENDMENTS TAKE MONSANTO'S TRADE SECRETS FOR A PRIVATE USE IN VIOLATION OF THE FIFTH AMENDMENT.

The Fifth Amendment also prohibits any taking by the government for a private use, regardless of whether compensation is paid. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937); *Cole v. City of La Grange*, 113 U.S. 1, 6 (1885). This proscription, reflecting the Framers' belief that property rights are the "essential nature of all free governments," exists as a fundamental limitation on the governmental transfer of property between private parties. *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 252 (1905). Recent federal and state court decisions reveal that, although applied sparingly, the Fifth Amendment's private use restriction is particularly applicable to legislation that unconditionally transfers property between private parties.<sup>60</sup>

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<sup>59</sup> Even if a Tucker Act remedy were consistent with FIFRA, it would be inadequate to provide "just" compensation. Each use of Monsanto's trade secret data to register another's pesticide and each trade secret's disclosure would require Monsanto to bring suit after suit for money damages in the Claims Court, which is neither "certain" nor "reasonable" as the Fifth Amendment requires. See *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981).

<sup>60</sup> See, e.g., *Midkiff v. Tom*, 702 F.2d 788, 793 (9th Cir.), *prob. juris. noted*, 104 S. Ct. 334 (1983); *Wells v. Air Prods. & Chems., Inc.*, 383 F. Supp. 146, 149 (N.D. W. Va. 1974); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5-6 (Ky. 1979); *Phillips v. Foster*, 211 S.E.2d 93, 96 (Va. 1975).

The district court correctly held that amended Section 3(c)(1)(D), by its own terms, takes Monsanto's property for a private use. Under this provision, Monsanto's trade secret property is used by *private* parties (Monsanto's competitors) for their own advantage, and Monsanto is deprived of its right to prevent such use and to prevent the competitors from receiving the resulting benefit. Indeed, EPA does not dispute that, but for the district court's injunction, Monsanto's property would be used for just such a purpose. J.A. 58-59. Recognizing that the true recipients of this governmental taking were private companies, Congress required them to pay their competitors directly for the taking in arbitration proceedings. See pages 7-8, 41-42 *supra*.

Such a governmental transfer between private parties contravenes the Fifth Amendment's private use limitation. In *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), the Court overturned a comparable Texas Railway Commission order compelling private pipeline owners to transport, and afford a market for, the natural gas of independent wells instead of their own products. Justice Brandeis, speaking for a unanimous Court, held that this transfer to independent well operators "who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets and the construction of such pipelines" constituted an impermissible taking of the pipeline owners' property for private use. *Id.* at 78. After scrutinizing the effect of the Commission's order, the Court rejected arguments that the regulation could be sustained as a means of preventing waste and protecting common gas reserves. *Id.* at 70. In *Missouri Pacific R.R. v. Nebraska*, 164 U.S. 403 (1896), the Court invalidated a state order permitting a private association to build a grain elevator on railroad property. Because the order did not ensure that use of the elevator would directly benefit the public, as opposed to the private recipients, the Court held that the order constituted an invalid transfer of the railroad's

property "to an association of private individuals . . . for their own benefit." *Id.* at 417.<sup>61</sup>

The FIFRA use provision violates the Fifth Amendment principles set forth in *Thompson and Missouri Pacific*.<sup>62</sup> Monsanto is forced to share its property with its business rivals so that they can market competing products without doing the research and testing Monsanto had done. The private beneficiaries have sole discretion to decide whether to use Monsanto's property and are the ones who benefit at Monsanto's expense.<sup>63</sup>

The invalidity of this taking for private use is not avoided by EPA's recitation that Congress enacted the legislation to meet a public purpose under the Commerce Clause.<sup>64</sup> Whether property taken by the government is for a public or private use is a judicial inquiry. *Madisonville Traction Co. v. Saint Bernard*

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<sup>61</sup> *Accord, Chicago, Milwaukee & St. Paul R.R. v. Wisconsin*, 238 U.S. 491, 499 (1915) (Wisconsin's transfer of railroad's property to individual passengers void because no showing of public benefit); *Wells v. Air Prods. & Chems., Inc.*, 383 F. Supp. at 149-50 (transfer of private easement barred where there was no condition for public use).

<sup>62</sup> The fact that Monsanto's trade secrets are in EPA's possession when competitors obtain use of the property does not make the use public. EPA is simply an instrument for the private use, and it is the private competitors who have sole discretion to initiate the taking, receive the right to use, and offer to pay for the private use.

<sup>63</sup> *Berman v. Parker*, 348 U.S. 26 (1954), is not to the contrary. The case involved only land use reform, not governmental transfers of property between parties that compete against one another. The taking was carefully regulated in *Berman* to assure that the property would be used only in accordance with a comprehensive redevelopment plan. By contrast, FIFRA § 3(c)(1)(D) permits unfettered use by competitors, who may not share Monsanto's commitment to product safety and quality control. See note 52 *supra*.

<sup>64</sup> EPA's contention that the FIFRA provisions serve a sufficient public purpose to be sustained as an exercise of Congress' power under the Commerce Clause, see EPA Brief at 19-26, does not pardon this violation of the Fifth Amendment. It has long been established that the Fifth Amendment is an independent limitation on Congress' substantive authority under the Commerce power. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979); *United States v. Cress*, 243 U.S. 316, 326 (1917). See also *United States v. Security Industrial Bank*, 103 S. Ct. 407, 410 (1982).

*Mining Co.*, 196 U.S. at 252; *Sears v. City of Akron*, 246 U.S. 242, 251 (1918); *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930).<sup>65</sup> While Congress believed that the taking would increase competition in the pesticide industry, that is the beginning of the inquiry not the end, as *Thompson* shows. See Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 Sup. Ct. Rev. 351, 365-69. In light of the direct private use involved here, such an indirect public benefit does not rise to the level required by the Fifth Amendment.<sup>66</sup> The legislature may act to increase competition by many means but simply taking property from A and giving it to B to create a new competitor is not one of them. Such a rationale would sustain any governmental taking merely on the basis that competition might be enhanced, a proposition this Court squarely rejected in *Thompson*. Cf. *Cincinnati v. Vester*, 281 U.S. at 447. See also *Washington-Summers, Inc. v. City of Charleston*, 430 F. Supp. 1013, 1015 (S.D. W. Va. 1977) ("property cannot be taken by eminent domain for a predominantly private purpose").<sup>67</sup>

<sup>65</sup> See generally Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409 (1983); Note, *Eminent Domain: Private Corporations and the Public Use Limitation*, 11 U. Balt. L. Rev. 310 (1982); Meidinger, *The "Public Use" of Eminent Domain*, 11 Envtl. L. 1, 44-49 (1980). See also B. Ackerman, *Private Property and the Constitution* 190 n.5 (1977).

<sup>66</sup> In recent decisions, state courts have recognized that the distinction between a public use permitting a taking and a general public interest is crucial to interpretation of the Taking Clause. Otherwise the private use limitation would be erased from the Constitution. See *City of Owensboro v. McCormick*, 581 S.W.2d 3, 6 (Ky. 1979) ("if public use was construed to mean that the public would be benefited . . . there would be absolutely no limit on the right to take private property"); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) (public benefit not synonymous with public use); *Phillips v. Foster*, 211 S.E.2d 93, 96 (Va. 1975) (same).

<sup>67</sup> Several states have formulated this test in terms of a requirement that a taking cannot further predominantly private purposes. See *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455 (Fla. 1975); *Pulos v. James*, 302 N.E.2d 768, 771 (Ind. 1973); *Burger v. City of Beatrice*, 147 N.W.2d 784, 791 (Neb. 1967); *Hogue v. Port of Seattle*, 341 P.2d 171, 192 (Wash. 1959); *Opinion of the Justices*, 126 N.E.2d 795, 803 (Mass. 1955).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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